IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 449.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, TERRITORY OF HAWAII, AT CHAMBERS, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH J. DARLINGTON,
WILLIAM F. MATTINGLY,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 442.

ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, PLAINTIFF IN ERROR,

vs.

HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF FIRST CIRCUIT, TERRITORY OF HAWAII, AT CHAMBERS, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR, DEFENDANTS IN ERROR.

And now comes said plaintiff in error, by Joseph J. Darlington and William F. Mattingly, his attorneys, and moves the court to grant and pass an order restraining said defendants in error from further proceedings in the matter of the amended motion and petition of Annie Thelma K. Parker, by her next friend, J. S. Low, to remove A. W. Carter as guardian, entitled: "In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate. At Chambers," or to grant unto the plaintiff in error such other or further relief in the premises as he may be lawfully entitled to, until the hearing of this case on the merits in this court.

JOSEPH J. DARLINGTON,
WILLIAM F. MATTINGLY,
Attorneys for Plaintiff in Error.

And said plaintiff in error files herewith in support of the foregoing motion the affidavit of Sidney M. Ballou, one of the attorneys for said Alfred W. Carter, entitled in this cause, made at Honolulu, Territory of Hawaii, which is as follows, viz:

Affidavit of Sidney M. Ballou.

HONOLULU, OAHU,
Territory of Hawaii. } ss.

SIDNEY M. BALLOU, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, plaintiff in error in the above entitled cause; that heretofore, to wit, on the 7th day of September, 1904, said plaintiff in error, by his attorneys, presented a petition for a writ of prohibition to the Honorable Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, which petition was entitled:

> "In the Supreme Court of the Territory of Hawaii. In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the Circuit Court of the First Circuit, at chambers, and J. S. Low, next friend of Annie T. K. Parker, a minor."

That thereafter, to wit, on said 7th day of September, 1904, a writ of prohibition issued, allowed by said Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, prohibiting said Honorable George D. Gear, second judge as aforesaid, from taking further cognizance of a certain "Amended motion and petition of Annie T. K. Parker, by her next friend, J. S. Low, to remove A. W. Carter as guardian," and from proceeding further therein, and prohibiting said J. S. Low, next friend of Annie T. K. Par-

ker, a minor, from proceeding further in said amended motion and petition until further order of the Supreme Court of the Territory of Hawaii.

That said petition for a writ of prohibition raised a Federal question, to wit, whether the statutes of the Territory of Hawaii purporting to confer judicial power and authority upon circuit judges at chambers to hear and determine judicial matters not incident or ancillary to any cause pending in some court are null and void, being in conflict with section 81 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30, 1900, and commonly known as "The organic act of the Territory of Hawaii."

That said petition duly came on for hearing before the Supreme Court of the Territory of Hawaii, which rendered its decision therein on the 7th day of November, 1904, which decision was against said plaintiff in error and was based solely upon the ground that the Territorial statutes conferring such power upon circuit judges at chambers were not in contravention to said organic act, but were in full force still and valid; and thereupon, to wit, on said 7th day of November, 1904, a decree was filed by said Supreme Court of the Territory of Hawaii, which decree was entitled in said court and cause, and was in words and figures as follows, to wit:

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

In the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, second judge of the Circuit Court of the First Circuit, at chambers, and J. S. Low, next friend of Annie T. K. Parker, a minor.

Decree.

The above entitled matter having duly come on for hearing before the full court, Messrs. Ballou & Marx appearing for petitioner, and J. Alfred

Magoon–J. Lightfoot for respondents, upon full consideration by the court, and in pursuance of the decision this day filed, the petition for permanent writ of prohibition is hereby denied, and the temporary writ heretofore issued herein is hereby dissolved.

Dated Honolulu, November 7th, 1904.

By the Court:

(Sgd.) GEORGE LUCAS, *Clerk.*

Approved as to form.

(Sgd.) BALLOU & MARX.

Indorsed and filed November 7, 1904.

That thereafter, to wit, upon the 8th day of November, 1904, affiant as attorney aforesaid and on behalf of said plaintiff in error, presented to the Honorable Walter F. Frear, chief justice of the Supreme Court of the Territory of Hawaii, a petition for a writ of error from the Supreme Court of the United States; that said Walter F. Frear, chief justice as aforesaid, signed an order allowing said writ of error, which order is in words and figures as follows, to wit:

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

OCTOBER TERM, 1904.

Alfred W. Carter, Guardian of the Property of Annie T. K. Parker, a Minor, Plaintiff in Error, *vs.* Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, and John S. Low, Next Friend of Annie T. K. Parker, a Minor, Defendants in Error.	Writ of Error.

Order Allowing Writ of Error from the Supreme Court of the United States.

The above entitled matter coming on to be heard upon the petition of the petitioner therein for a writ of error from the Supreme Court of the United States

to the Supreme Court of the Territory of Hawaii, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, the writ of error to operate as a supersedeas, and that the bond for that purpose presented by said petitioner in the sum of $1,000 be and the same is hereby approved.

HONOLULU, *November 8, 1904.*

(Signed) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

That thereafter, upon said 8th day of November, 1904, affiant filed in the office of the clerk of the Supreme Court of the Territory of Hawaii said petition for a writ of error and order allowing writ of error, together with an assignment of errors and an approved bond in the sum of one thousand dollars ($1,000), whereupon, upon said 8th day of November, 1904, a writ of error issued in said cause under the hand and seal of Henry Smith, clerk of the Supreme Court of the Territory of Hawaii, and a citation to the defendants in error, to wit, the Honorable George D. Gear, second judge of the Circuit Court of the First Circuit, Territory of Hawaii, at chambers, and John S. Low, next friend of Annie T. K. Parker, a minor, and said citation, together with copies of all the appellate papers heretofore mentioned, was, on said 8th day of November, 1904, served by affiant upon J. Alfred Magoon, one of the attorneys for said defendants in error.

That thereafter, to wit, on the 9th day of November, 1904, said J. Alfred Magoon, as attorney for J. S. Low, next friend, presented before the Honorable George D. Gear, second judge as aforesaid, a motion which had been filed November 7, 1904, to set for hearing on its merits the "amended

motion and petition of Annie Thelma K. Parker, by her next friend, J. S. Low, to remove Alfred W. Carter as guardian;" that at the hearing of said motion, on said 9th day of November, 1904, affiant called the attention of said Honorable George D. Gear, second judge as aforesaid, to all of the appellate papers before mentioned, showing the originals thereof to said Honorable George D. Gear, and calling his attention to the supersedeas in said order allowing writ of error contained; but that said Honorable George D. Gear, second judge as aforesaid, did, on the 11th day of November, 1904, enter an order at chambers, setting said cause for hearing on its merits on the 21st day of November, A. D. 1904.

And affiant verily believes that unless restrained by suitable process issued by this Honorable Supreme Court of the United States, or by a justice thereof, said Honorable George D. Gear, second judge as aforesaid, will proceed to the hearing of said cause on its merits in defiance of the writ of prohibition heretofore issued and of the supersedeas to the decree dissolving the same; and affiant alleges that such proceeding will cause great and useless expense to said plaintiff in error and to the estate of the minor of whom he is guardian; that said trial will be long and costly, in that said plaintiff in error will be obliged to incur large expenses for costs and counsel fees and to incur large expenses for witnesses' fees in bringing a large number of witnesses from the island of Hawaii to Honolulu, and will thereby suffer great and irreparable injury.

And further affiant sayeth not.

SIDNEY M. BALLOU.

Subscribed and sworn to before me this 15th day of November, A. D. 1904.

[NOTORIAL SEAL.] R. W. ATKINSON,
Notary Public, First Judicial Circuit.

Brief Statement of Facts Appearing From the Record.

1904, July 27 (transcript, p. 22), "amended motion and petition" of J. S. Low, a next friend of said minor, for removal of Carter as guardian, before judge of circuit court, at chambers.

1904, September 2 (transcript, p. 23), opinion of Judge Gear overruling objection as to jurisdiction.

1904, September 7 (transcript, p. 3), petition of Carter to the Supreme Court of Hawaii for writ of prohibition *vs.* Judge Gear and Low, on ground that the judge at chambers was without jurisdiction to proceed to hear the case on its merits; that the statutes of Hawaii authorizing such hearing by a judge at chambers were null and void as being in conflict with Article III, section 1, of the Constitution of the United States, and that they were also void, being in conflict with section 81 of the act of Congress for the government of Hawaii, approved April 30, 1900 (31 Stat. 141).

1904, September 7 (transcript, p. 1), writ of prohibition issued.

1904, October 3 (transcript, pp. 29, 31), answers of Judge Gear and Low to the petition and writ

1904, November 7 (transcript, pp. 38 to 52), opinion of the Supreme Court, by Frear, C. J.

1904, November 7 (transcript, p. 53), decree of the Supreme Court of Hawaii, concluding, "the petition for permanent writ of prohibition is hereby denied, and the temporary writ heretofore issued herein is hereby dissolved."

1904, November 8 (transcript, p. 59), petition for writ of error from this court.

1904, November 8 (transcript, p. 61), order allowing writ of error.

This order recites on its face, "*and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said*

matter," the writ of error is allowed, "*the writ of error to operate as a sepersedeas;*" and the bond "*for that purpose, presented by said petitioner,*" is approved.

1904, November 8 (transcript, p. 62), writ of error.

1904, November 8 (transcript, p. 64), assignment of errors.

1904, November 8 (transcript, p. 67), approved bond on writ of error.

1904, November 8 (transcript, p. 69), citation to defendants in error and acknowledgment of service (p. 70) on same date.

Counsel for plaintiff in error in this court are advised by local counsel in Hawaii that the hearing upon which Judge Gear insists will occupy about one month.

Respectfully submitted.

JOSEPH J. DARLINGTON,
WM. F. MATTINGLY,
Attorneys for Plaintiff in Error.